

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,669

RAYMOND H. BRUNELLE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

GEORGE MORRIS FAY,
United States Attorney.

HAROLD H. BACON,
JOSEPH M. HOWARD,
FREDERICK G. SMITHSON,
Assistant United States Attorneys.

*United States Court of Appeals
For the
District of Columbia Circuit*

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Joseph D. Stewart

CLERK

QUESTIONS PRESENTED

Whether it was an abuse of discretion, amounting to a deprivation of appellant's constitutional rights, for the trial court to deny a new trial.

1. Whether the failure of trial counsel to call alibi and character witnesses to refute certain circumstantial evidence, offered by the prosecution to show that the appellant had committed the crime for which he was convicted, was such an abuse of discretion or neglect of duty as to deny appellant his right to adequate representation as guaranteed by the Sixth Amendment to the Constitution of the United States.

2. Whether the denial by the trial court of a motion to subpoena witnesses under Rule 17 (b), Federal Rules of Criminal Procedure, was such an abuse of discretion as to deprive appellant of his right under the Sixth Amendment of the Constitution of the United States to have compulsory process to obtain witnesses in his behalf.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,669

RAYMOND H. BRUNELLE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On January 25, 1950, appellant was arrested, charged with a violation of U. S. Code, Title 18-2421, in that it was alleged the appellant transported in interstate commerce a certain woman, one Barbara M. Terry, for the purpose of debauchery and for other immoral purposes (Br. 2).

While appellant was in confinement on this charge, he was questioned on January 25, 1950, by a police officer, one Detective Sergeant Grayston W. Chapman, Metropolitan Police Department, in the presence of a witness, Charles E. Thomas, regarding certain cameras and other photographic equipment which had been reported stolen by Mr. Thomas (J. A. 14, 17-18). Mr. Thomas testified that his cameras and other photographic equipment were stolen from his automobile on the evening of January 23, 1950, while it was parked in front of 1013 Thirteenth Street, N. W., in the city

of Washington, D. C., and that he identified the property, which was recovered in a camera store at 1003 Pennsylvania Avenue, N. W., Washington, D. C., by certain numbers on the cameras and lenses, which numbers he had had in his possession (J. A. 13-14, 15).

In addition, Mr. Thomas testified he heard a conversation between the appellant and Officer Chapman at the D. C. Jail, and that the appellant admitted to him that he stole Mr. Thomas' property from his car by using a small tool as a lever to force open the right vent window, and that he had sold it to a camera dealer here in town (J. A. 14, 15-16).

The second Government witness, one Sam Schwartz, likewise identified by his record book certain cameras and other photographic equipment by the numbers appearing on the cameras and lenses as the property which the appellant sold to him on January 24, 1950, in his own name, alleging an address of 170 Central Street, Newark, New Jersey (J. A. 16, 17). Mr. Schwartz then testified the property of Mr. Thomas which had been previously identified as Government Exhibits 1 through 4, inclusive, was the same property that appellant sold him, and this property was admitted into evidence (J. A. 17; R. 24-25).

Officer Chapman, on examination, stated that he questioned the appellant in the presence of Mr. Thomas and after receiving a report from Mr. Schwartz that he had bought certain cameras and equipment from the appellant, and that the appellant admitted to him in Mr. Thomas' presence that he had jimmied the right vent window of Thomas' car and had stolen the property which he then sold to a second-hand dealer at 1003 Pennsylvania Avenue, N. W., which address is the address of Mr. Schwartz's place of business (J. A. 17-18; R. 35). Further, Officer Chapman stated the appellant did not appear upset, nor did he complain of ill health (J. A. 18-19). He did state the appellant told him on May 10 and 12 that he had purchased this property from some one, but that the appellant could not describe or tell him who it was or where he bought it (J. A. 19). (Appellant also admitted to Robert B. Kurtzman, a special agent of the Federal Bureau of Investigation, on January 30, 1950, that

he had stolen the cameras from an automobile and that he had sold them downtown (J. A. 20).

An indictment was filed in open court on a charge of Grand Larceny (J. A. 20-21). On March 27, 1950, he was arraigned and pleaded not guilty on March 31, 1950.

On May 8, 1950, appellant was acquitted on the charge of transporting in interstate commerce a certain woman, for the purpose of debauchery and other immoral purposes, the same woman whom appellant now contends might testify as a character as well as an alibi witness for appellant (Br. 2, 3). Apparently, this material witness was released from custody upon the return of verdict of the jury, although the record is silent on this point.

Trial counsel for appellant filed a motion supported by an affidavit signed personally by appellant under Rule 17 (b), Federal Rules of Criminal Procedure, on May 12, 1950 (J.A. 27-28) (Motion and affidavit for witnesses) which was heard on the same day and denied (J.A. 22-24). This motion and supporting affidavit set forth the names and addresses of six witnesses, but did not include the name of Barbara M. Terry, the witness appellant now declares might testify to his character, provide an alibi, and describe his manner of doing business in second-hand goods (Br. 3). Appellant was found guilty by a jury of the charge of Grand Larceny on May 18, 1950 (J.A. 21-22). He filed a motion acting in his own behalf for a new trial, which motion was heard and denied on May 26, 1950, by the court, at which time the court commented on the able representation afforded appellant by his trial counsel (J.A. 21, 24-26).

RULE INVOLVED

Rule 17 (b) of the Federal Rules of Criminal Procedure provides:

The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence

of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

SUMMARY OF ARGUMENT

Where the trial court denied appellant's motion for new trial, was such denial, in view of the facts and evidence before the court, as well as the proposed testimony of six witnesses, the benefit of whose testimony was denied the appellant, such an abuse of discretion by the trial court as to deny appellant a fair and impartial trial as guaranteed by the Sixth Amendment to the Constitution of the United States. Here, there was substantial evidence of guilt, together with the appellant's admission of guilt to three witnesses, as well as full consideration by the court of the value of the proposed testimony sought by appellant, which testimony was not deemed material by the court.

I

The failure of trial counsel for appellant to call alibi and character witnesses did not constitute inadequate representation in view of the record of what trial counsel had done in his efforts to defend the appellant. Attention is called to the fact that no mention of the witness, Barbara M. Terry, is made in the transcript of the trial, in the motion for new trial or in the oral argument on the motion, and that appellant seeks to insert this proposed witness for the first time in his brief.

II

The denial of appellant's motion to subpoena witnesses under Rule 17 (b), Federal Rules of Criminal Procedure, whose testimony would have dealt with appellant's mental condition in 1946 and with his method of doing business in second-hand goods in Lowell, Massachusetts, was not such

an abuse of discretion as to deny appellant his rights with regard to the issuance of compulsory process for witnesses in his behalf.

ARGUMENT

The Denial of Appellant's Motion for New Trial, in View of Evidence Before the Trial Court, Constituted No Abuse of Discretion

Appellant claims that the denial of his motion for a new trial denied him his rights under the Fifth and Sixth Amendments to the Constitution of the United States to have effective representation and to have a fair and impartial trial (Br. 4, 6). Such refusal of a new trial is within the trial court's discretion and is not assignable as error nor reviewable. *Landrum v. United States*, 63 F. 2d 990, 62 App. D.C. 18; *Moder v. United States*, 64 F. 2d 703, 62 App. D.C. 65, cert. den. sub nom.; *Caparotta v. United States*, 53 S. Ct. 660, 289 U.S. 739; *Beard v. United States*, 82 F. 2d 837, 65 App. D.C. 231, cert. den. 56 S. Ct. 675, 298 U.S. 655. Here, the prosecution proved the ownership and value of the property involved, its theft and sale, and finally, its identification by the owner and the purchaser to whom appellant sold the property. In addition, prosecution offered the substantive evidence of appellant's admissions on two separate occasions that he committed the larceny in question.

Appellant argues that the abuse of discretion is to be found in the failure of trial counsel to call certain witnesses, and in the denial of the motion to subpoena certain other witnesses. The Government will deal with these in the order stated.

I

Failure of Trial Counsel to Call Certain Alibi and Character Witnesses Does Not Constitute Such Inadequate Representation As to Entitle Appellant to New Trial

Appellant would have this Court believe that his trial counsel failed to properly represent him in that he did not secure certain alibi and character witnesses who would

have proved appellant's innocence (J.A. 27-28) (Notice of appeal, No. 10), and that he was generally lax and incompetent (J.A. 21). In this regard, the Court's attention is directed to the record of the motion for new trial and sentence in this case in which trial counsel stated what he had done to the court in his efforts to represent the appellant (J.A. 24-26). In trial counsel's statement regarding the local witnesses, the bellboys and the waitress, and their failure in any way to support the assertion of the appellant that they could supply an alibi for him, trial counsel very properly pointed out that these witnesses could not testify to any material facts. In fact, they could not testify in any way as to appellant's whereabouts at the time the crime was committed (J.A. 25).

Appellant confirms the efforts undertaken by trial counsel in stating that as to certain other witnesses named by him, he was advised by his then counsel that these people had been fired or quit their position in the hotel (J.A. 26). Further, appellant claimed that there was a witness who could testify that he was ill the night the crime was committed and that the witness got some food for appellant. However, the appellant could not at that time, nor has he since, stated the name of this witness (J.A. 26).

It is respectfully submitted that this vague and indefinite description of the witness was a mere subterfuge on the part of appellant without merit in an attempt to secure a new trial. Nowhere is it alleged that, should this appeal be granted and a new trial ordered, the appellant would be able to describe and identify any of these witnesses by name and address so as to be entitled to subpoena them as witnesses in his behalf.

The record in this case is silent as to any of these witnesses until the appellant speaks of them in his motion for new trial. In the motion to subpoena witnesses under Rule 17 (b) (J.A. 27-28) there is no mention of these witnesses which appellant would now have the Court believe would absolve him of any complicity in this crime.

Indeed, even that motion fails to include the witness, Barbara M. Terry, who appellant stated would furnish an

alibi for him on the night this crime was committed (J.A. 21, 24-26). Appellant knew of the presence of this witness in this jurisdiction. In fact, she was here in custody from January to May 8, 1950, as a material witness against appellant in the Mann Act case (Br. 2). Certainly, in view of such knowledge, appellant should not now be heard to claim he was unable, because of poverty, to obtain her testimony for his subsequent trial on the charge of Grand Larceny (Br. 2). The trial court must exercise sound discretion in the grant or denial of a motion to subpoena witnesses at Government expense, and where the appellant fails to indicate he desires a certain witness until the trial has begun, such delay would be sufficient justification for a denial of such aid. *Gates v. United States*, 122 F. 2d 571, cert. den. 62 S. Ct. 478, 314 U.S. 698. In the present case, nothing is said of this witness and her proposed testimony until the brief on appeal (Br. 4). Appellant argues also that the prosecution should have called Barbara M. Terry as a witness (Br. 4, 5). No adequate reason is given, however, for this argument, except the vague thought that this witness might throw some light on the facts and circumstances of the larceny (Br. 5).

Thorough examination of the transcript of the trial, appellant's motion to subpoena witnesses and his motion for new trial together with oral argument thereon, fails to reveal any reference to the witness Barbara M. Terry, whom appellant now would have this Court believe would absolve him of any complicity of the crime for which he stands convicted. In the brief, great emphasis is placed by appellant on what this witness might testify, however, it is respectfully submitted that little or no reliance should be placed on such statements as they constitute only what appellant hopes the witness would testify and that by his own failure to call this witness appellant deprived the trial court and jury of whatever benefit her testimony would have been.

At the conclusion of the hearing on the motion for new trial, and after trial counsel had fully explained what steps he had taken to obtain witnesses and evidence on behalf of the appellant, and after appellant himself was heard,

the trial court commented on the diligent manner in which counsel had acted (J.A. 26). It is respectfully submitted that trial counsel could not have been expected to do anything more due to the failure of the appellant to furnish the names and addresses of the alleged witnesses that he desired and which names and addresses he cannot supply even at this date.

Present counsel argues that the fact that the motion to subpoena witnesses under Rule 17 (b), Federal Rules of Criminal Procedure, was denied, and that appellant did not take the stand because of a prior criminal record, should have put trial counsel on notice to secure the attendance of Barbara M. Terry (Br. 7). This argument is not reasonable, as the facts bearing on the larceny in no way indicate that this witness was involved.

Counsel argues on this alleged inadequacy of representation by trial counsel. Trial counsel in this action was the same counsel who represented the appellant in the earlier case in which the appellant was acquitted (Br. 2, 3). Surely, it cannot seriously be contended with any sincerity that trial counsel was able and experienced enough in the first trial to win an acquittal, but was inexperienced, lax and inept in the trial on the charge of Grand Larceny. In this trial, original counsel for appellant was given more than adequate time to prepare for trial, from January to May 18, 1950, to be exact, and had appellant divulged any information that would have led his counsel to suspect that Barbara M. Terry could furnish a possible alibi for the appellant prior to her release as a material witness for the Government, he most certainly would have called her or secured her appearance.

Rule 17 (b), Federal Rules of Criminal Procedure, provides that indigent defendants may be permitted, at the court's discretion, to subpoena witnesses, provided proper motion is addressed to the court for that purpose, together with an affidavit setting forth the name and address of each witness, the testimony he is expected to give, and provided that the testimony of each such witness would be material to the defense. This rule by its wording makes it mandatory

that the defendant state the name and address of each such witness. The court's attention is again directed to appellant's motion to subpoena such witnesses (J. A. 27) and it is respectfully pointed out that nowhere therein does the name and address of witness, Barbara M. Terry, appear. Nor, does it appear from appellant's brief that should this Court grant the appellant a new trial, that he would be able to comply at this or any later date and furnish to the trial court the name and address of this witness, in order that she might be subpoenaed on his behalf. Similar argument to that made by appellant was made to this Court in the case of *Neufield, et al. v. United States*, 118 F. 2d 375, which this Court saw fit to dismiss. If anything, the facts in this case are stronger in favor of the Government's position, as in that case the witness sought was a self-confessed participant in the very crime for which the defendants were charged and was in the custody of the Government at the time, while the witness, Barbara M. Terry, in the present case was not and is not in such custody.

II

Denial of Appellant's Motion to Subpoena Witnesses under Rule 17 (b), Federal Rules of Criminal Procedure, Was Not an Abuse of Discretion

Appellant contends the action of the trial court in denying his motion to produce certain witnesses to testify on his behalf at the cost of the Government was such an abuse of discretion as to deny him his rights under the Sixth Amendment to the Constitution of the United States (Br. 4, 5).

Appellant requested on May 12, 1950, six witnesses to be subpoenaed in his behalf as an indigent defendant (J. A. 27). With regard to two of these witnesses, appellant proposed to show that he had been committed for mental observation in a state hospital at Worcester, Massachusetts, in 1946. The court hearing this motion denied it as to these two witnesses saying, "* * * that all that is expected (of these two witnesses) they will testify to is that the defendant was committed in 1946 to Worcester State Hospital for observation" (J. A. 23). It is believed that the court, in the exer-

cise of its discretion as to the length of time it will receive evidence of the condition of appellant's mind, properly denied appellant's motion with regard to such evidence in this case. *Hart v. United States*, 130 F. 2d 456.

With regard to the other four witnesses requested by appellant to testify as to appellant's business practices in the purchase and sale of second-hand goods, the court denied appellant's motion stating (J.A. 24):

THE COURT: I am going to deny this motion. If the defendant was carrying on a second-hand business here, there would be some witnesses probably whom he could subpoena right from this town. The mere fact that he was carrying on at some prior time a second-hand business in Lowell, Massachusetts, I think is pretty far fetched. Motion denied.

The decisions of the Supreme Court in *Crumpton v. United States*, 138 U. S. 361; *Goldsby v. United States*, 160 U. S. 70, 16 S. Ct. 216, go so far as to hold that the right to summon witnesses at the expense of the Government is left to the discretion of the trial court, and that the exercise of that discretion is not reviewable. See also *Gates v. United States*, *supra*; *Austin v. United States*, 19 F. 2d 127, cert. denied 48 S. Ct. 22, 275 U. S. 523; *Gibson v. United States*, 53 F. 2d 721.

As pointed out before, it is believed that the decision of this Court in *Neufield, et al. v. United States*, *supra*, disposes of appellant's contentions that the denial of his motion to subpoena witnesses was an abuse of discretion by the trial court of his right to have compulsory process for witnesses. This Court, in discussing the act of the trial court in denial of the motion on behalf of the defendants therein, stated at p. 385:

In support of this motion the guarantee in the Sixth Amendment of compulsory process for obtaining witnesses in an accused's favor is again relied upon. Although not formally designated as such by counsel, this motion was one, in effect, for the issuance of a writ of *habeas corpus ad testificandum*, the common law writ for the production of witnesses who are confined in jail and who are thus beyond the reach of the

ordinary subpoena. The issuance of such a writ was at the common law discretionary. 8 Wigmore, Evidence (3d ed., 1940) 110; 1 Greenleaf, Evidence (16th ed., 1899) 473; *In re Thaw*, 3 Cir., 1908, 166 F. 71, Ann. Cas. 1915D, 1025. And it has been held in the Federal courts that the issuance of all compulsory process is discretionary where the production of the witness is sought at Government expense. *Goldsby v. United States*, 1895, 160 U. S. 70, 16 S. Ct. 216, 40 L. Ed. 343; *Crompton v. United States*, 1891, 138 U. S. 361, 11 S. Ct. 355, 34 L. Ed. 958; *Gibson v. United States*, 8 Cir., 1931, 53 F. 2d 721; *Austin v. United States*, 9 Cir., 1927, 19 F. 2d 127; *Dupuis v. United States*, 9 Cir., 1925, 5 F. 2d 231. Although Neufield has filed in this appeal an affidavit *in forma pauperis*, since the record of the proceedings below does not show that the production of Spencer Waldron was to be at Government expense we will make the somewhat strained assumption in the defendant's favor that he was able and expected to pay the cost of the transportation of Waldron and a necessary guard or guards. But we think that even under this circumstance the issuance of the writ was discretionary, that the guarantee of the Sixth Amendment is not so absolute as to require the production of a witness despite an unreasonable application for the writ. For the due administration of justice there must be a limit to delay; and if the right to the writ for the production of a jailed witness, were absolute in the sense that the writ must be issued and executed whenever demand is made, it would be within the power of an accused to compel a continuance by making a late demand. We think it was permissible for the trial judge to take it, from what the record shows was said to him, that Neufield had known since 1934 of Waldron's plea of guilty and sentence; certainly the judge was not bound to disbelieve the undenied statement of the District Attorney to that effect; and the judge knew also from the record before him that Neufield had had representation by Solomon, since the time of his arraignment on September 21, 1939. Therefore the trial judge properly regarded the application for process against Waldron as unseasonable. An accused cannot omit to inform his lawyer during an extended period—in this case approximately eight weeks—before trial of the existence of a possible material witness and then successfully charge the trial judge with an abuse of dis-

cretion for refusing a demand for the production of the witness not made until the moment the case is called. While in the usual course it would seem important to have present at the trial a confessed participant in the crime charged, we can not say that under the circumstances of the instant case the trial judge abused his discretion in denying the application for Waldron's production.

In view of the foregoing discussion, and the statement of the Court in *Neufield, et al. v. United States, supra*, it is maintained that the appellant has been denied none of his constitutional rights, but, in fact, has had a fair and impartial trial in accordance with the best traditions of American jurisprudence and properly found guilty of the charge brought against him.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be affirmed.

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JOINT APPENDIX

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APPENDIX

1 Thursday, May 18, 1950.

The above-entitled cause came on for trial at 10:00 a.m.

Before: HONORABLE JAMES W. MORRIS, one of the Associate Judges of the District Court of the United States for the District of Columbia, and a jury, which, having been duly examined on voir dire, was duly impaneled and sworn.

* * * * *

5 CHARLES E. THOMAS was called as a witness on behalf of the government and having been first duly sworn, was examined and testified as follows:

Direct examination.

6 Q. Now, sir, I call your attention to the evening of January 23, 1950; were you driving your automobile that evening?

A. Yes, sir.

Q. And did there come a time when you parked that automobile?

A. Yes, sir.

Q. And where did you park it?

A. I parked it almost directly in front of the Daily News office at 1013 13th Street, N.W.

Q. That is in the city of Washington, D. C.?

A. Yes, sir.

Q. And did you leave your car there?

A. Yes, sir.

Q. And did you leave any property in your automobile?

A. Yes, sir.

Q. Would you please tell us what properties you left in your automobile?

A. I left a Speedgraphic camera, camera bag, various and sundry equipment, such as film holders, filters, flash extension equipment, Roloflex camera, with sundry equipment for that, including flash equipment, filters, supplementary lenses, and such.

Q. When you left the car, did you leave that equipment in the car?

7 A. I left it in the car.

Q. And how long were you gone from your automobile?

A. About four and a half hours.

Q. What time did you return?

A. About 11:30 that night.

Q. When you returned to the car, what did you find?

A. I found that the glass wind vent on the right-hand side of the front door, the right front door, had been forced open, breaking the gear assembly on it, that my car had been opened, and that my camera equipment was gone.

Q. And, sir, did there come a time that you saw this camera equipment again?

A. Yes, sir.

Q. And where did you see it again and at what time?

A. I saw it at police headquarters.

Q. And did you identify it there as your equipment?

A. Yes, sir.

Q. Did there come a time that you went to the District of Columbia jail?

A. Yes, sir.

Q. And what day was that?

A. January 26.

Q. And did you talk with someone at the jail?

A. Yes, sir.

Q. And what was that man's name?

8 A. Raymond Brunelle.

Q. Do you see that man in the courtroom today?

A. Yes, sir.

Q. Is he the defendant in this case?

A. Yes, sir.

Q. And did you hear a conversation between the defendant in this case and officer Chapman of the Metropolitan Police Department?

A. Yes, sir.

Q. Would you relate that conversation to us, sir?

A. The conversation was a questioning on the part of Mr. Chapman of Mr. Brunelle in regard to his possible association with the theft of this camera equipment, at which time Mr. Brunelle admitted that he had stolen the camera equipment from the automobile and had sold it to a camera dealer here in town.

Q. Did he say how he had gained admittance to the automobile?

A. Yes, sir.

Q. Did he give any of those details?

A. Yes, sir. He said that he had used a small tool as a lever to force open the window. Does that answer your question?

Q. Yes.

Mr. BACON: Now, sir, will you mark this Government Exhibit 1, please, and this camera Exhibit 2.

9 (Government's Exhibits Nos. 1 and 2 were marked for identification.)

By Mr. BACON:

Q. I am going to show you a camera marked Government Exhibit 1 for purposes of identification. Can you identify that camera, sir?

A. Yes, sir.

Q. How can you identify it?

A. I can identify it by serial numbers that I have in my pocket.

* * * * *

13 Cross-examination.

14 Q. Did you at the time of this conversation that you had with the defendant in the presence of Sergeant Chapman mention that bag?

A. Yes, I did.

Q. Did you mention it to the defendant?

A. Yes, I did.

Q. Do you remember what you asked him?

A. Yes, I do.

Q. Would you repeat it, please?

A. I asked him—I answered a question of his. He asked me if I had recovered all of the property. In turn, I said no, that I had not and described this small general purpose leather bag. Shall I go ahead with that conversation?

Q. Yes.

A. He then told me that he did not take the small leather bag, that he had taken the contents of the small bag and put that sundry equipment into the big leather bag, which you see before you, and had thrown the empty, small other bag into the front seat of the automobile.

15 Q. Did you recover the small bag?

A. No, sir.

Q. Did you ask him then how he opened the window of the car?

A. Yes, I did.

Q. And he told you what?

A. He told me that he had pried it open with a small metal instrument of some sort.

Q. And he also admitted the taking of the cameras and the property to you?

A. He did.

Q. In response to your question?

A. Yes.

* * * * *

21 SAM SCHWARTZ was called as a witness on behalf of the Government, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. BACON:

Q. Would you give us your full name?

A. Sam Schwartz.

Q. And what is your occupation, sir?

A. I am in the photographic business selling photographic supplies.

Q. Is that new or used?

A. Both new and used.

Q. How long have you been in that business, sir?

A. Over twenty years.

Q. And do you have a store here in the District of Columbia?

A. Yes, our store is located at 1003 Pennsylvania Avenue, N. W.

Q. And did you have that store between January 23 and 26?

A. Yes.

Q. And you were present in the store?

A. Yes.

22 Q. Do you have with you your record book?

A. Yes, sir.

Q. That book is required to be kept by law, as I understand it?

A. Yes, sir.

Q. Would you please look in that book within the dates of January 20 and January 26 and see if you purchased any property from a man by the name of Brunelle?

A. Yes, we have a record here of the 24th of January, 1950, of having purchased two cameras and accessories from a man, Raymond H. Brunelle, whose address was given as 170 Central Street, Newark, New Jersey.

Q. Would you please read the list of the properties that you purchased from Mr. Brunelle?

A. It is listed under report number 1447, a press camera and a reflex camera. The press camera is a Speedgraphic, four by five, number 340895.

23 Q. And do you see the Mr. Brunelle in this courtroom that you purchased this camera from?

A. Yes, sir.

Q. And pointing my finger to the defendant in this case, is this the man that you indicate?

A. Yes, sir.

* * * * *

30 Cross-examination.

* * * * *

32 Q. Did you ask him whose property this was?

A. I don't recall that I asked him definitely. He indicated, however, that it was his property.

Q. Did he tell you that he had bought the property for resale?

A. I don't remember a statement of that kind.

* * * * *

34 GRAYSTON W. CHAPMAN was called as a witness on behalf of the Government, and having been first duly sworn, was examined and testified as follows:

Direct examination.

* * * * *

36 Q. After you picked this material up, did you have occasion to talk to the defendant in this case?

A. I did.

Q. And when did you talk to him?

A. Ten-thirty a. m., January 25.

Q. That is of this year?

A. This year.

Q. And where did you talk to him?

A. At the District jail.

Q. And did you have a conversation with him concerning this equipment?

A. I did.

Q. Would you relate to us, please, that conversation?

A. He said that after 7:00 o'clock on the 23rd of January 1950 he had—he placed the time because it was after dark—broken into a car and stole the equipment; that he sold it to the second-hand dealer at 1003 Pennsylvania Avenue, N. W.

Q. And what is the number of Mr. Schwartz store?

A. 1003 Pennsylvania Avenue, N. W.

Q. Did he tell you how he broke into the car?

A. He jimmied the right vent window.

Q. Did he tell you that?

A. He told me that.

37 Q. Did you have any further conversation with him concerning this transaction?

A. No, except that he wanted to sell it to get married.

Q. Did you have this property to show to him?

A. No, I did not.

Q. Has he ever been shown this property by you, sir?

A. He has not.

Q. How did he identify the property that he had taken to you in the jail?

A. From description.

Q. Did you read the description to him, or did he tell you?

A. I read the assignment and asked him if that was similar, and he said that it was.

38 Cross-examination.

Q. Was the complaining witness, Mr. Thomas, ever present at any of the conversations you had with the defendant?

A. He was with me at the time.

Q. He went to the District jail with you?

A. Yes, sir, he did.

Q. Did he take part in interrogating the defendant?

A. Yes.

Q. Did he ask him any questions?

A. I think he did.

Q. Who asked the defendant about the method used in opening the window?

A. I asked him.

39 Q. At the time you spoke to the defendant was he physically ill?

A. I wouldn't know about that. He didn't complain to me.

Q. Was he upset?

A. He didn't appear to be.

Q. Did he at any time during this conversation with you on January 26 express himself as being so disgusted that he would admit to anything?

A. No.

Q. Did you have occasion to see the defendant again?

A. I did.

Q. And where was that?

A. At the District jail.

Q. On what date?

A. It was about the 10th or 11th of this month.

Q. 10th or 11th of May?

A. It was Tuesday of last week.

40

* * * * *

A. On the second visit he said that he had purchased it from someone, that he couldn't describe or tell me who it was.

Q. Did he tell you where he had bought it?

A. No, he didn't tell me where.

41 Q. During either of these conversations did the defendant ever tell you that he had been discharged from the U. S. Navy on a psycho discharge?

A. I think I discussed his discharge. I am not sure whether it was psycho or whether it was a bad conduct discharge or just what it was.

Q. You did not have occasion later to check on that?

A. I didn't check on it, no, sir.

Mr. WALSH: I have no further questions, Your Honor.

Mr. BACON: No further questions.

* * * * *

43 ROBERT KURTZMAN was called as a witness on behalf of the Government, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. BACON:

Q. Would you give us your full name, sir?

A. Robert H. Kurtzman.

Q. And what is your occupation, sir?

A. I am a Special Agent of the Federal Bureau of Investigation.

Q. And how long have you been so employed, sir?

A. Nine and a half years.

Q. Now, I call your attention to the defendant in this case, Raymond Brunelle. Did you have occasion to speak with this man in District jail?

A. I did have.

Q. And in the course of that conversation was this particular case discussed?

44 A. Yes, it was.

Q. Would you please tell us what discussion you had with Mr. Brunelle in relation to this case?

A. This discussion occurred in the rotunda of the District jail on January 30, 1950. During the course of our discussion the cameras involved in this case were mentioned. Mr. Brunelle told me that he had stolen the cameras. He couldn't explain the exact place, but he said he got them from an automobile.

He told me that he sold them downtown. He couldn't describe the actual place where he sold them, but he said that he sold them in order to buy some wedding rings.

Mr. BACON: No further questions, Your Honor.

THE COURT: Cross-examination?

Mr. WALSH: No questions, Your Honor.

Mr. BACON: May he be excused?

THE COURT: You may be excused.

* * * * *

46 Mr. WALSH: Your Honor, the defense will rest, too.

* * * * *

73 THE CLERK: Mr. Foreman, has the jury agreed on a verdict?

THE FOREMAN: We have.

THE CLERK: How do you find the defendant?

THE FOREMAN: We find the defendant guilty as charged.

* * * * *

76 Filed in open court March 27, 1950. Harry M. Hull, Clerk.

The Grand Jury charges:

On or about January 23, 1950, within the District of Columbia, Raymond H. Brunelle stole the property of Charles E. Thomas of the value of about \$402.50, consisting of the following:

1 camera, of the value of	\$ 90.00
1 camera, of the value of	100.00
2 flash guns, each of the value of	40.00
1 flash gun clamp, of the value of	6.00

1 reflector, of the value of	1.00
1 kodak adapter ring, of the value of	1.50
1 flash gun mounting bracket, of the value of	4.00
1 leather case, of the value of	40.00
2 supplementary lenses, each of the value of	40.00

* * * * *

79 Filed May 26, 1950. Harry M. Hull, Clerk.

MOTION FOR NEW TRIAL

Comes now the deft. in proper person & moves for new trial, & for appointment of new counsel, for the following reasons:

1. Deft's present attorney, Richard Walsh, failed & refused to investigate and produce in court certain evidence & witnesses which would have proved deft's innocence. Mr. Walsh was advised by the deft. the identity of numerous persons who could have proved the defendant was of good character; however, Mr. Walsh refused to ask the Court to subpoena character witnesses.

80 Mr. Walsh also refused to even attempt to get witnesses who could have established an alibi for the deft. He was generally lax, disinterested & incompetent & ineffective in his representation of the defendant.

2. If new counsel is appointed & a new trial granted, deft. can conclusively prove his innocence by character & alibi witnesses who are available, but who did not testify at first trial because counsel did not make any attempt to produce them.

Respectfully submitted,

RAYMOND H. BRUNEILE.

(MAY 26TH, 1950.)

81 May 26, 1950. Motion for new trial filed, argued & denied.

82 Filed Jun. 1, 1950. Harry M. Hull, Clerk.

On this 26th day of May, 1950 came the attorney for the government and the defendant appeared in person and by counsel, Richard L. Walsh, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty, of the offense of Grand Larceny as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eight (8) Months to Two (2) Years.

* * * * *

Friday, May 12, 1950.

The above-entitled cause came on for hearing of motion before Honorable Alexander Holtzoff, at 12 noon.

89 Mr. WALSH: Your Honor, this is a motion on the part of an indigent defendant to subpoena witnesses under Rule 17(b) of the Federal Rules of Criminal Procedure, costs to be paid by the United States Government, and in support is an affidavit signed and executed by the defendant.

THE COURT: Well, it seems to me that it would be improper to subpoena a social worker of a state hospital in Worcester, Massachusetts merely for the purpose of testifying to the fact that the defendant was an inmate there. Can't this fact be established by some record?

Have you a record of that?

Mr. McLAUGHLIN: When he got through, your Honor, with his argument, I was going to register opposition.

THE COURT: Well, I think he is through with his argument. He says he has nothing to add.

Mr. WALSH: Yes, I have no argument, your Honor, other than what is contained in the affidavit of the defendant, who has made this request.

90 Mr. McLAUGHLIN: Your Honor, this is Mr. Bacon's case. As I understand—I talked to Mr. Bacon about it and he is tied up in one of the other courts—this case, your Honor, has been down several times.

THE COURT: The name has become familiar to me, because there are a couple of cases against this defendant.

Mr. McLAUGHLIN: The facts are very simple, your Honor. This defendant is charged with stealing a camera out of an automobile. The camera, I believe, to belong to one of the reporters of a newspaper here in town, the News, I believe.

So the facts are very simple in the case.

As I say, this case has been down four or five times, and each time it was announced ready and it was not reached. The defense made no request then for witnesses.

The Government's contention is that the motion is filed on the part of the defendant personally for dilatory purposes.

The evidence, as he outlined in his affidavit, I believe would have no bearing whatsoever on this case.

This defendant, I understand, had a case last week where he also at the time of the trial, I believe after the trial started, made a request to be permitted to serve some witnesses in Boston, Massachusetts, and was rather indefinite as to the identity of them, and a certain amount of them did not appear, and I understand that their testimony had no bearing on the case at all.

91 I do not think that the motion is filed—not in regards to the attorney who represents the defendant, as I understand it was the request of the defendant himself—I think that they are not sincere and they are merely filed for the purpose of delay.

THE COURT: Now, as to Dr. Teplin and Miss Bess, I shall deny the motion, because the affidavit indicates that all that is expected they will testify to is that the defendant was committed in 1946 to Worcester State Hospital for observation.

Now, the next witness is Mrs. Wacome and Mrs. Annette Brunelle, Dr. Victor Brunelle and Joseph Sweeney, who will testify that the defendant bought and sold second-hand goods without the use of receipts.

Now, how is that material, Mr. Walsh?

Mr. WALSH: Your Honor, the Government's case must ultimately be based on the inference to be drawn from the defendant's exclusive possession of recently stolen property without explanation. The defense will be that he received this property from a third person and sold it to this camera shop.

In other words, he bought it from someone and sold it to the camera shop. He cannot say who he bought it from because he is not in the habit of taking receipts or giving receipts; and that this has been his business in the past; buying and selling most anything he could get his hands
92 on, back in his home town in Lowell, Massachusetts.

The Government's case must be based on that, because there is no testimony that he was actually seen removing and carrying away the property.

THE COURT: Is this case based on possession of stolen property?

Mr. McLAUGHLIN: I believe it is, your Honor, the camera stolen out of an automobile and the defendant pawning it.

THE COURT: Who is Annette Brunelle and Dr. Victor Brunelle? I notice they have the same last name as the defendant.

Mr. WALSH: I know that Annette Brunelle is his mother.

THE COURT: Well, I think she would come without a subpoena—I am sure, being the defendant's own mother.

And who is Dr. Brunelle?

Mr. WALSH: With respect to the mother, I don't share your Honor's feeling about that. She had to be subpoenaed for this trial that Mr. McLaughlin referred to.

Dr. Victor Brunelle, the name I understand is just coincidental. There is no relationship there. He is the doctor in the town of Lowell who has had dealings with the defendant; has bought second-hand things from him.

THE COURT: I am going to deny this motion. I think if the defendant was carrying on a second-hand business here, there would be some witnesses probably whom he
93 could subpoena right from this town. The mere fact that he was carrying on at some prior time a second-hand business in Lowell, Massachusetts, I think is pretty far-fetched.

Motion denied.

* * * * *

96

Friday, May 26, 1950.

The above-named defendant came before HONORABLE JAMES W. MORRIS for sentence at two o'clock p. m., on Friday, May 26, 1950.

97 THE COURT: Do you wish to say anything before I pass sentence?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Very well.

THE DEFENDANT: I would like a motion for a new trial.

THE COURT: A motion for a new trial?

THE DEFENDANT: Yes, sir.

THE COURT: Well, I don't—The defendant is not a person to ask for a new trial. (Reading from file): "my counsel failed and refused to investigate certain evidence, to prove an alibi," and his character.

I don't think on that alone I could grant a new trial. You have to have some substantial evidence in the matter as to what the evidence might be, what evidence might be adduced for a new trial.

Can you give me any evidence of witnesses you sought and couldn't get?

Mr. WALSH: I filed a motion and Judge Holtzoff overruled the motion. This was a motion by the defendant to bring witnesses here who were out of the jurisdiction at government expense. That was overruled by Judge Holtzoff.

The local witnesses were the bell boys at the hotel. I secured the addresses of the bell boys and subpoenaed
98 them. Two showed up. They didn't know the defendant and of course couldn't testify. The other witness was a waitress who worked at a bar. She no longer worked in the hotel. The bell boys no longer worked at the hotel. I sought this girl out, in the Southeast, where she worked at a bar. She didn't remember defendant, and certainly couldn't testify for him.

THE COURT: The witnesses didn't know anything about the facts in this controversy?

THE DEFENDANT: If I am permitted—

THE COURT (Interposing): Yes, you are permitted.

Mr. WALSH: The evidence indicates what they testified to. The two witnesses employed at the hotel did testify regarding his emotional and mental condition for the purpose of showing when he made this alleged confession to the F. B. I. men he was in such an emotional state, he would be depressed, and made a confession which perhaps was not justified by the facts.

His mother and divorced wife did testify he had been in the second-hand business up there, hence his possession of the second-hand property in question. The doctor and another witness also testified he was in the second-hand business up there. He just happened not to take receipts. He was buying and selling, which might help to explain where he got these stolen goods.

99 Judge Holtzoff overruled the motion based on the evidence. The other witnesses, the bell boys and the waitress no longer worked there. The only ones mentioned. I tried to get them all. They couldn't testify to any material facts. They couldn't testify that he was any other place other than the scene of the crime between seven and eleven, during the time the offense was committed. They couldn't testify as to his whereabouts at all.

THE COURT: What do you think the witnesses could have done had they been present (Addressing defendant)?

THE DEFENDANT: Before the witnesses came up I wouldn't expect them to remember me. I had to have them

brought before I could identify them. One could prove beyond a reasonable doubt I wasn't in the hotel all that night. Two F. B. I. men testified in this trial. They had no right to testify whatever. I can prove I am not guilty. I bought this property, see. Since then they have gone back to New Jersey, the bell boy in particular. I took my camera. She cried when the flashlight went off. They don't know who I meant. I have been in jail three or four months. They do happen to remember me. One had just been working there since I have been in jail. I identified other people, they who were on duty that night. Mr. Walsh explained those people had been fired or quit, but one was working there for quite a while. He knows me; has
100 seen me.

THE COURT: How do you identify that man now?

THE DEFENDANT: The only way would be by his being presented to me. I don't know his name. He can remember me, because he knows I was sick in the hospital that night. He ran across the street to get sandwiches for me that night. She can prove this. If I remember correctly, two F. B. I. men testified in this trial. They had no right to testify. They couldn't testify why they came to see me at the City Jail. I couldn't tell them my past record.

THE COURT: Why couldn't they testify?

THE DEFENDANT: Because they came up here and questioned me about White Slavery. I don't deny the property was identified. I sold it with good intentions. The F. B. I. stood there. Admitted I stole the property.

THE COURT: I don't understand what you mean. You told them you stole the property?

THE DEFENDANT: Just that, in so many words. I sold everything but this particular case.

THE COURT: Yes?

THE DEFENDANT: A person told me—admitted that when I was in the City Jail. They asked me about this case. I said I didn't know anything about it. No one could have known about the property unless they stole it. I don't think—

THE COURT (Interposing:): I don't think the showing you have made would justify me in holding you
101 have not had a fair trial. I think counsel has been diligent in prosecuting your rights.

The motion is denied, and the sentence of the court is eight months to two years.

102 Filed May 12, 1950. Harry M. Hull, Clerk.

MOTION OF INDIGENT DEFENDANT TO SUBPOENA WITNESSES
UNDER RULE 17(b)

The defendant, by and through his counsel, moves this Honorable Court to order that subpoenas issue under Rule 17(b), Federal Rules of Criminal Procedure, to the following named persons at their respective addresses:

Dr. Teplin, Worcester State Hospital, Worcester, Mass.
Miss Pauline Bess, Worcester State Hospital, Worcester, Mass.

Mrs. Ruth Wacome, 3 Fellows Street, Roxbury, Mass.

Mrs. Annette Brunelle, East Merrimac Street, Lowell, Mass.

Dr. Victor P. Brunelle, Chalefaux Building, Kearney Square, Lowell, Mass.

Mr. Joseph Sweeney, House of Correction, Bellerica, Mass.

And for reasons therefore, the defendant states that the evidence which said witnesses will give is material to his defense, that the defendant cannot safely go to trial without said witnesses, and that the defendant does not have sufficient means and is actually unable to pay the fees of the witnesses.

RICHARD L. WALSH,
Attorney for Defendant.

103 AFFIDAVIT OF DEFENDANT UNDER RULE 17(b)

I, Raymond H. Brunelle, being first duly sworn according to law, depose and say that I am the defendant in the above entitled cause, and, in support of my request made under Rule 17(b), Federal Rule of Criminal Procedure, that this Honorable Court order the issuance of subpoenas for the appearance of witnesses with costs to be paid by the United States, state as follows:

1. That I am a citizen of the United States.
2. That I do not have sufficient means and am actually unable to pay the fees of said witnesses.
3. That I cannot safely go to trial without the witnesses whose appearances I have requested for the purpose of giving testimony.
4. That Dr. Teplin and Miss Pauline Bess are psychiatrist and psychiatric social worker, respectively, at the

Worcester State Hospital, Worcester, Mass., and will testify that I was committed to said hospital in 1946 for mental observation and that I am emotionally unstable and in situations of stress become depressed and discouraged; that this testimony is material to my defense in that it will provide and explanation for my statement given to police at time of my arrest and which will be against my interest if not satisfactorily explained.

5. That Mrs. Ruth Wacome, 3 Fellows Street, Roxbury, Mass., and Mrs. Annette Brunelle, East Merrimac Street, Lowell, Mass., will testify that my business was buying and selling second-hand goods; that this is material to my defense in that it will provide an explanation for my temporary possession of the property which is the subject matter of the offense for which I have been indicted.

104 6. That Dr. Victor P. Brunelle, Chalefaux Building, Kearney Square, Lowell, Mass., and Mr. Joseph Sweeney, House of Correction, Ballerica, Mass., will testify that I bought and sold second-hand goods without the use of receipts; that this is material to my defense in that it will provide an explanation for my inability to prove my purchase of the property which is the subject matter of the offense for which I have been indicted.

RAYMOND H. BRUNELLE.

2486-10-107

